Supreme Court, U.S.
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No. 09-485

IN THE
SUPREME COURT OF THE UNITED STATES

GEORGE GRISHAM,
Petitioner,
V.
MARILYN S. BROOKS, SUPERINTENDENT,
ALBION STATE CORRECTIONAL
INSTITUTION, *ET AL.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Honorable Court establish a bright-line test for Circuit Courts of Appeal that have found an "extraordinary circumstances" exception to the holding of *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079, 166 L.Ed.2d 924 (2007) that attorney error does not equitably toll the 28 U.S.C. §2244(d) one-year statute of limitations on filing an application for a writ of habeas corpus?

2. Is there a need for a pronouncement from this Honorable Court that, in situations in which a constitutional issue at the heart of a 28 U.S.C. §2254 Petition did not ripen until State court collateral proceedings, the 28 U.S.C. §2244(d) one-year statute of limitations does not begin to run until the conclusion of the State court collateral proceedings?

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The Orders and Opinions of the United States Magistrate Judge, the United States District Court for the Western District of Pennsylvania, and the United States Court of Appeals for the Third Circuit are included in the Appendix to the Petition for Writ of Certiorari filed by petitioner, George Grisham.

JURISDICTION

Petitioner has invoked jurisdiction pursuant to 28 U.S.C.A. §1254(1).

STATEMENT OF THE CASE

A. Procedural History

Petitioner, George Grisham, was charged by Criminal Informations filed in the Court of Common Pleas of Allegheny County, Criminal Division. At CC 200104181, petitioner was charged with one (1) count each of Involuntary Deviate Sexual Intercourse[1], Aggravated Indecent Assault[2], and Corruption of Minors[3].

On July 23, 2003, petitioner appeared before

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[1] 18 Pa.C.S.A. §3123

[2] 18 Pa.C.S.A. §3125

[3] 18 Pa.C.S.A. §6301

the Honorable Donna Jo McDaniel for a jury trial. Leo Harper, Esquire represented petitioner. Assistant District Attorney Elliott Howsie, Esquire represented the Commonwealth.

On July 24, 2003, after sending two (2) inquiries to the court, the jury reached its verdict, finding petitioner guilty as charged. Petitioner's bond was revoked and sentencing was set for September 23, 2003.

On August 4, 2003, new privately-retained counsel, Carl Marcus, Esquire, entered his appearance in the case. On September 23, 2003, petitioner, though Attorney Marcus, filed a Motion for New Trial, which was denied. In said motion, petitioner, through counsel, raised the following claims:

> Trial counsel was ineffective in failing to require that the best evidence be

produced with regards to the defendant's time sheet given to the jury to take into deliberations, pursuant to Rule 1002 of the Pennsylvania Rules of Evidence. . . . The time sheet was one of the few pieces of tangible evidence given to the jury, and it is entirely conceivable that it was critical to the determination of guilt or innocence. Trial counsel must have had no reasonable basis for not requiring the best evidence. He could not reasonably believed that a time sheet, which was critical to his case, that had white-out all over it an mixed up days was going to carry the weight that it could and should have. Finally, counsel's failure to require the actual time sheet certainly prejudiced the defendant. The jury came out of deliberations with questions for the judge regarding the time sheet. The jurors clearly believed the time sheet to be a critical piece of evidence in determining which party was telling the truth and which was lying. The fact that they came out and asked a question about the time sheet and its imperfections, and then returned a verdict of guilt indicates the importance of the time sheet. It is clear and conceivable that had the jury had the accurate and true time sheet, the verdict would have went (sic) in favor of the defendant.

Trial counsel was ineffective for failing to object to the instructions given by this Honorable Court, even after the judge admitted to giving the wrong instruction. The failure by the judge to give the appropriate instructions clearly confused the jury and prejudiced the defendant.

The verdict in this matter was contrary to law and against the weight of the evidence such that it shocks the conscience of the court. There was evidence presented on both sides as to what happened in this matter. The credibility of the victim and the other witnesses of the Commonwealth were clearly in question, to the point of unbelievability. On the other hand, the defense put on character witnesses and the defendant himself took the stand and presented a clear uniform case. Most of the Commonwealth witnesses testified that they didn't remember most of the events surrounding these charges and had versions of the story that conflicted with each other. For instance, B[.] W[.] testified that she didn't remember stopping to get iced tea and that she never brought any home to her mother/aunt. While her mother/aunt, and the defendant, testified that iced tea was bought and taken home to her. The verdict was clearly against the weight of the

evidence.

> The evidence was insufficient to support the verdict of guilt in these matters. The Commonwealth failed to prove these charges beyond a reasonable doubt.

On September 23, 2003, petitioner appeared before Judge McDaniel for sentencing. Petitioner was sentenced as follows: at Count 1, Involuntary Deviate Sexual Intercourse, to a term of imprisonment of ten (10) to twenty (20) years, effective July 24, 2003, at Count 2, Aggravated Indecent Assault, to a consecutive term of imprisonment of five (5) to ten (10) years, and at Count 3, Corruption of Minors, to no further penalty.

On October 7, 2003, petitioner, through Attorney Marcus, filed a Notice of Appeal which was docketed in the Superior Court of Pennsylvania at **No. 1804 WDA 2003**. On November 13, 2003, petitioner, through Attorney Marcus, filed a Concise

Statement pursuant to an October 28, 2003 Order of Court. In his concise statement, petitioner, through Attorney Marcus, raised the following claims:

> The verdict was against the weight of the evidence.
>
> The verdict was against the sufficiency of the evidence.
>
> The trial court erred in failing to grant Defendant's Omnibus Pre-trial Motion.
>
> The trial court erred in failing to grant Defendant's Motions in Limine.
>
> The Defendant was denied the effective assistance of trial counsel.
>
> The trial court erred as to the discretionary aspects in the imposition of the sentence on the Defendant.

On February 18, 2004, petitioner filed an Application for Remand seeking a new trial. On February 27, 2004, the Superior Court issued an Order granting petitioner permission to file, in the Court of Common Pleas, a written Motion for New

Trial on the ground of after-discovered evidence.

On March 1, 2004, petitioner, through Attorney Marcus, filed a Motion for a New Trial on the Ground of After-Discovered Evidence. In said motion, petitioner, through counsel, raised the following claims:

> It is respectfully submitted that this after-discovered evidence consists of two reports from a private investigator, retired police detective Raoul Rapneth, and warrants this Honorable Court's order for a new trial.
>
> The first report, attached hereto as Exhibit "A," is a transcript of a tape-recorded interview with a juror, one Kristen Cummings. Ms. Cummings stated, among other things, that: "Umm ... But I know, there was about seven (7) or eight (8), as soon as we sat down, just said **not guilty**." Tr. p.9. When asked by Detective Rapneth, "Not Guilty. What determined, or what caused you guys to get swayed the other way?," Ms. Cummings answered, "The time sheet, with the white out." Tr. p.10.

The second report, attached hereto as Exhibit "B," is a type-written statement of a juror, one Charlotte King. On the important issue of the "time sheet with the white out" referenced by Ms. Cummings, above paragraph 4, Ms. King stated:

On page 186 of the transcript, [trial defense counsel] Leo Harper moved "for the admission of Defense Exhibits A and B, the official records of [defendant] Mr. Grisham's employment at Soldiers and Sailors Hall on the week of January 12th." The court replied, "They will be admitted." Leo Harper asked, "May I publish them to the jury, your Honor?" The court stated, "I don't think we need to do that. They will be available to the jury in deliberations." The time sheet **was not available in deliberations,** the Judge new (sic) this at the start of the deliberations and did nothing to see to it that the evidence was made available to the jury as she stated in court.

The white out on the day sheet was not addressed in court, should the juror question this since it was not brought up in court. The white out was not determined good or bad because there was no mention of it in court, the jury assumed it was bad,

> and therefore came up with a guilty verdict ..."
>
> It is respectfully submitted that, in consideration of the above, this Honorable Court should enter an order granting a new trial.

On March 29, 2004, Judge McDaniel issued an Order denying the motion. On March 30, 2004, Judge McDaniel filed her Opinion.

On June 7, 2004, petitioner, through Attorney Marcus, filed his Brief for Appellant and Reproduced Record in the Superior Court of Pennsylvania, which was docketed at **No. 1804 WDA 2003**. On appeal, petitioner raised the following issues:

> 1. Did the honorable trial court abuse its discretion when it failed to send out with the jury for consideration during deliberations crucial records refuting an alleged confession by defendant when: a) during trial the honorable trial court had denied defense counsel's request to publish the records to the jury; and b) the honorable trial court had stated in front of the jury that the records

would be made available to the jury during deliberations.

2. Did the honorable trial court err when this Honorable Court remanded with the specific Order: "The trial court is **DIRECTED** to consider and rule upon" (emphasis in original) and a) the trial court took no evidence on this motion; and b) the trial court conducted no oral argument on this motion; and c) the trial court entered an Order denying this motion; and d) in its Opinion, the trial court did not address this motion.

On June 22, 2004, the Commonwealth, through Assistant District Attorney Sandra Preuhs, Esquire filed a Brief for Appellee. On September 22, 2004, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County.

On October 22, 2004, petitioner, through Attorney Marcus, filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania, which was docketed at **No. 561 WAL 2004**. In his petition, petitioner raised the following claims:

1. Did the honorable trial court

abuse its discretion when it failed to send out with the jury for consideration during deliberations crucial records refuting an alleged confession by defendant when: a) during trial the honorable trial court had denied defense counsel's request to publish the records to the jury; and b) the honorable trial court had stated in front of the jury that the records would be made available to the jury during deliberations.

2. Did the honorable trial court err when this Honorable Court remanded with the specific Order: "The trial court is **DIRECTED** to consider and rule upon" (emphasis in original) and a) the trial court took no evidence on this motion; and b) the trial court conducted no oral argument on this motion; and c) the trial court entered an Order denying this motion; and d) in its Opinion, the trial court did not address this motion.

On April 5, 2005, the Supreme Court dismissed the petition.

On March 28, 2006, petitioner, through Attorney Marcus, filed a Petition for Relief Under the Post Conviction Relief Act. On June 23, 2006,

petitioner, through Attorney Marcus, filed an Amended/Supplemental Petition for Relief Under the Post Conviction Relief Act. In his petition, petitioner raised the following claims:

> 1. The jury was prevented from deliberating on and determining issues presented in the trial of the case. The jury was denied full disclosure of facts and materials presented in the trial of the case. There was a defect and/or disruption in the jury's truth-finding process. The defendant, the jury, and our citizenry were denied a trial, specifically the guaranteed procedures of a trial, required under the Sixth and Fourteenth Amendments to the United States Constitution, the Due Process Clause of the United States Constitution, and Article 1 Section 9 of the Pennsylvania Constitution as well as under Pennsylvania law.
>
> 2. The Honorable trial court itself inadvertently denied Grisham's right to a trial and to due process in violation of Article 1, Section 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.
>
> 3. In the alternative, it may be that

petitioner's trial counsel provided ineffective assistance in violation of Article 1, Section 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments of the United States Constitution. It was the responsibility of the honorable trial court's staff to ensure that the exhibits went out with the jury for deliberations as instructed by the court but it was the responsibility of petitioner's trial counsel to take the simple measure of ensuring that this happened.

4. [T]he juror referenced above, Kristen Cummings, told Detective Rapneth that after the verdict she telephoned petitioner's trial counsel and specifically advised him of this and other problems during trial. All that was needed was for petitioner's trial counsel to file a post-sentence motion and explain these matters to the honorable trial court and for the record. Filing this simple pleading would allowed the trial to correct the problems. Instead, trial counsel did nothing. This was clear ineffective assistance of counsel in violation of Article 1, Section 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

5. Petitioner's Sentence resulted

> from the unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced.
>
> 6. [T]here were numerous other witnesses, including both witnesses as to the facts and witnesses as to character, that petitioner's trial counsel never investigated let alone called at trial. Indeed, petitioner's trial counsel did virtually no preparation with the witnesses he did call, and did no preparation with petitioner himself. Petitioner's trial counsel failed to explain petitioner's options, including plea options, or otherwise provide meaningful advice or even information needed for knowing and intelligent decision-making. Petitioner's trial counsel was so deficient that he advised petitioner that the whole matter was simply a "crap shoot." This was clear ineffective assistance of counsel in violation of Article 1, Section 9 of the Pennsylvania Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

On September 20, 2006, the Commonwealth, through Assistant District Attorney Amy L. Fitzpatrick, Esquire, filed a Commonwealth's

Answer to Post Conviction Relief Act Petition. On September 25, 2006, Judge McDaniel issued an Order of Court, which gave Notice of the Court's intention to dismiss the petition. On October 13, 2006, petitioner, through Attorney Marcus, filed a Response to Pa.Crim.P. 907 Notice of Proposed Dismissal of Petition for Post Conviction Collateral Relief. On October 31, 2006, Judge McDaniel dismissed the petition.

On November 28, 2006, petitioner, through Attorney Marcus, filed a Notice of Appeal. On December 22, 2006, petitioner filed a Statement of Matters Complained of on Appeal and a Brief in Support of Statement of Matters Complained of on Appeal. On July 10, 2007, Judge McDaniel filed her Opinion.

On September 27, 2007, petitioner filed a

Brief for Appellant in the Superior Court of Pennsylvania, which was docketed at **No. 2261 WDA 2006**. On appeal, petitioner raised the following claims:

> 1. Was the Appellant's instant claim of violation of the Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I Section 9 of the Pennsylvania Constitution due to ineffective assistance of the Appellant's trial counsel waived?
>
> 2. Was the Appellant's instant claim of violation of the Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I Section 9 of the Pennsylvania Constitution due to ineffective assistance of the Appellant's trial counsel previously litigated?
>
> 3. Did ineffective assistance of Appellant's trial counsel violate the Appellant's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I Section 9 of the Pennsylvania Constitution?

On October 23, 2007, the Commonwealth, through Assistant District Attorney Rebecca Good McBride, Esquire, filed a Brief for Appellee. On March 7, 2008, the Superior Court affirmed the judgment of the Court of Common Pleas of Allegheny County.

On November 4, 2008, petitioner, through Joseph E. Hudak, Esquire, filed a Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody in the United States District Court for the Western District of Pennsylvania, which was docketed at **Civil Action No. 08-1539**. In his petition, petitioner raised the following claims:

> ¶12. A key issue in the Petitioner's trial was whether the testimony of one Donna Jones was fabricated from whole cloth. Jones testified that, in a telephone conversation, the Petitioner had confessed to Jones that the Petitioner had sexually assaulted Jones's younger cousin. If believed, Jones's testimony supported a conviction of the Petitioner. If shown to

be fabricated, Jones's testimony represented a potential conspiracy to frame the Petitioner. On this issue, the Petitioner's trial counsel offered into evidence a time card from the Petitioner's employer. The time card showed that Jones's testimony regarding the Petitioner's alleged confession, as to place and time, and therefore its very existence, could not possibly be true. The trial judge admitted the time card into evidence: "THE COURT: They will be admitted." The Petitioner's counsel requested permission to the time card to the jury: "MR. HARPER: May I publish them to the jury, Your Honor?" The trial judge replied, I don't think that we need to do that. ***They will be available to the jury in deliberation.***" (emphasis added.) During deliberations, the jury sent a note to the trial judge. The trial judge signed the note and marked the note as part of the record. The note addressed two matters, the first of which was, "1. The time card for Mr. Grisham [the Petitioner] is not here. It was supposed to be submitted as evidence." In response, the trial judge noted the matter on the record, and stated, "With the consent of counsel, I went to the jury room and explained that the time card as to question number one was inadvertently taken by

Ms. Fuller [the witness from the Petitioner's employer, who had brought the time card to court], that we would try to retrieve it if they wanted to see it, and that it was not—it was just something that inadvertently happened." On the record, the Petitioner's trial counsel did nothing to retrieve the missing time card that he himself had made the centerpiece of the Petitioner's defense, that he himself had offered and had admitted into evidence, that he himself had asked to publish to the jury, and that he himself knew the jury had requested for its deliberations. The jury returned the verdict of guilty on all counts and the Petitioner was sentenced to a term of incarceration of fifteen (15) to thirty (30) years.

* * * *

¶15. A second issue exists in this case. After his conviction, the Petitioner filed an appeal to the Superior Court of Pennsylvania. While the Petitioner's appeal to the Superior Court of Pennsylvania was pending, the Petitioner's appellate counsel filed a Pa.Crim.P. 720(c) Motion for Remand to the Trial Court. The Motion was based on a matter characterized by counsel as "after-discovered evidence." Specifically, a juror had come forward after the

> verdict and notified the Petitioner's trial counsel that a key document, the time card that the trial court had admitted into evidence and that had been promised to be sent out with the jury, was, in fact, never sent out with the jury. According to the juror, this error in the handling of the trial evidence had resulted literally in a ***change*** of the jury's verdict during deliberations. According to the juror, "not guilty" literally became "guilty" because of the missing evidence. (the prescience of the First Circuit in Anderson v. Butler, supra, and the Seventh Circuit in Harris v. Reed, supra, was factually demonstrated.) The Superior Court essentially remanded the matter to the trial court. Nonetheless, the trial court never conducted any hearing on the issue.

On November 7, 2008, Magistrate Judge Lisa Pupo Lenihan issued a Report and Recommendation that recommended that the petition be dismissed and a certificate of appealability be denied. On November 17, 2008, petitioner, through Attorney Hudak, filed a Supplement to Petition Under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody.

Also on November 17, 2008, petitioner, through Attorney Hudak, filed a Objection to Report and Recommendation of Magistrate Judge. On November 18, 2008, Magistrate Judge Lenihan issued an Order denying petitioner's supplement. On November 18, 2008, District Judge William L. Standish issued a Memorandum Order which adopted the Report and Recommendation as the opinion of the court and dismissed the petition and denied a certificate of appealability.

On December 18, 2008, petitioner, through Attorney Marcus, filed a Notice of Appeal. Petitioner's appeal was docketed in the United States Court of Appeals for the Third Circuit at **No. 08-4907**. On January 16, 2009, petitioner, through Attorney Marcus, filed a Memorandum in Support of Certificate of Appealability. On May 18, 2009, the

Third Circuit issued an Order which denied a certificate of appealability.

On August 17, 2009, petitioner, through Attorney Marcus, filed a Petition for Writ of Certiorari in this Court, which is currently docketed at **No. 09-485**.

B. Factual History

The Superior Court of Pennsylvania summarized the facts of the case as follows:

> The incident underlying this appeal occurred on January 11, 2001. Thirteen-year-old B.W. resided with her aunt, M.J., who was her legal guardian. B.W. was familiar with Appellant as she would see him when he came to pickup his two young children from the daycare run by M.J. from her and B.W.'s home. On the day in question, Appellant asked M.J. if B.W. could accompany him to Wal-Mart, so she could watch his children while he went into the store. Instead of going to Wal-Mart, Appellant took his children and B.W. into the living room, where Appellant played a music video that

contained nudity. After asking to see B.W.'s feet, Appellant wrestled her shoes off and told her that she had pretty feet. Although B.W. told Appellant it was time for her to go home, he hugged her and kissed her. He then lifted up her sweater and bra and kissed her breasts and stomach. B.W. began crying and told appellant to stop and take her home; however, he proceeded to pull down her pants, perform oral sex on her, and insert his thumb in her vagina. Shortly thereafter, Appellant took B.W. home at which time he told her not to tell anyone what had transpired.

The following day, B.W. confined in a friend and her guidance counselor what had occurred. With B.W.'s permission, the guidance counselor contacted M.J. and then took B.W. home, where B.W. explained to M.J. her encounter with Appellant. M.J. contacted the police and D.J., who was M.J.'s daughter and B.W.'s cousin.

On the morning of January 12, 2001, D.J. twice telephoned Appellant. He initially denied the allegations, but subsequently admitted that one thing led to the other, and he touched B.W.'s buttocks and breast.

Through the testimony of Linda

> Fuller, a staff assistant at Soldiers and Sailors Memorial Hall, Appellant's place of employment, his time card for January 12, 2001 was introduced into evidence, which indicated he logged in at 6:57 a.m. and out at 3:30 p.m.

(Appendix D 15-A-17-A).

REASONS FOR DENYING THE WRIT

I. THIS COURT HAS ESTABLISHED THAT INEFFECTIVE ASSISTANCE OF COUNSEL DOES NOT EQUITABLY TOLL THE AEDPA STATUTE OF LIMITATIONS TO FILE A PETITION FOR WRIT OF HABEAS CORPUS.

First, petitioner claims that this Court should create a "bright-line" test for the federal courts for the application of the equitable tolling in the filing of federal habeas corpus petitions. Petitioner argues that this Court should determine if attorney ineffectiveness should be considered an extraordinary circumstance to toll the statute of limitations of 28 U.S.C.A. §2244.

On the issue of whether this Court should grant a Petition for Writ of Certiorari, Supreme Court Rule 10 provides as follows:

> **Rule 10. Considerations Governing review on Certiorari**
>
> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following although neither controlling nor fully measuring the Court's discretion, indicate the character of reasons the Court considers:
>
> > (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a

> departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort, or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.
>
> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Supreme Court Rule 10.

Initially, the Commonwealth would note that

petitioner has failed to demonstrate that any of the considerations for the grant of a Petition for Writ of Certiorari. Petitioner is merely requesting that this Court to create a new rule, which he hopes would benefit him.

The Commonwealth submits that petitioner's Petition for Writ of Habeas Corpus was properly dismissed as untimely. The instant petition is subject to the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA). The applicable statute provides as follows:

> § 2244 Finality of determination
>
> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitations under this subsection.

28 U.S.C.A. §2244(d). The Commonwealth submits that the instant petition is untimely filed.

On September 23, 2003, petitioner was sentenced to a term of incarceration of not less than

fifteen (15) nor more than thirty (30) years. On September 22, 2004, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Allegheny County on direct appeal. On April 5, 2005, the Supreme Court of Pennsylvania denied petitioner's Petition for Allowance of Appeal on direct appeal.

On March 28, 2006, petitioner filed a Petition for Relief Under the Post Conviction Relief Act. On October 31, 2006, the petition was denied. On March 7, 2008, the Superior Court of Pennsylvania affirmed the judgment of the Court of Common Pleas of Allegheny County in denying the Post Conviction Relief Act Petition.

On November 4, 2008, petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of

Pennsylvania.

Petitioner's judgment of sentence became final for AEDPA purposes on July 4, 2005. A period of two hundred and sixty-four (264) days elapsed between July 6, 2005 and March 26, 2006. The limitations period would have been tolled during the period that petitioner's Post Conviction Relief Act petition was properly filed and pending in state court. The petition was under consideration by the state courts until March 7, 2008. Affording petitioner thirty (30) days to file a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania sets the date at April 8, 2008. Under these circumstances, petitioner would have had until July 18, 2008 to file a habeas petition in compliance with AEDPA. Petitioner did not file the instant petition until November 4, 2008. Accordingly, the instant petition was untimely and

properly dismissed, because petitioner did not file within the one (1) year statute of limitations. *See Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079 (2007).

The District Court addressed the claim as follows:

> Consequently, Petitioner's one-year limitations period ended on July 18, 2008. Unfortunately for him Petitioner did not file his federal habeas petition until November 4, 2008, over three months after his limitations period had expired. Nothing in the record in this action indicates that Petitioner is entitled to take advantage of any of the other provisions triggering the one-year limitations period. In this regard, Petitioner's petition for habeas corpus and his attachments do not indicate that Petitioner suffered any impediment to filing his federal petition. 28 U.S.C. §2244(d)(1)(B). Nor has he asserted that his claims are based on a newe constitutional right recognized by the United States Supreme Court and made retroactive to cases on collateral review. 28 U.S.C. §2244(d)(1)(C). In addition, he has not

> shown that his claims are based upon a factual predicate that could not have been discovered through the exercise of due diligence. 28 U.S.C. §2244(d)(1)(D).

(Appendix C 10-A-11-A). The District Court's dismissal of the petition was proper.

Petitioner argues that he is entitled to equitable tolling, because his federal habeas corpus counsel failing to file the petition in a timely fashion. Essentially, petitioner is arguing for this Court to reexamine its holding in *Lawrence v. Florida*, *supra*. In *Lawrence v. Florida*, this Court held as follows:

> Second, Lawrence argues that his counsel's mistake in miscalculating the limitations period entitles him to equitable tolling. If credited, this argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline. Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 756-757, 111 S.Ct. 2546, 115 L.Ed.2d

640 (1991).

Lawrence v. Florida, 549 U.S. 327, 336-337, 127 S.Ct. 1079, 1085 (2007). As established by this Court's precedent, petitioner's petition for Writ of Habeas Corpus was untimely and properly dismissed. Thus, petitioner would not be entitled to the grant of a Writ of Certiorari, because the Court of Appeals for the Third Circuit's resolution was not in conflict with the decisions of this Court.

II. THIS COURT AND CONGRESS HAVE CLEARLY ESTABLISHED THAT THE AEDPA TIME LIMITATION BEGINS AT THE CONCLUSION OF DIRECT REVIEW IN STATE COURT.

Second, petitioner claims that this Court needs to establish that the AEDPA time limitations should run one (1) year from the conclusion of state collateral review and not direct review as the statute states. Petitioner claims that in situations where a claim may not "ripen" until the conclusion of state collateral review, the statute of limitations should not begin until collateral review is completed.

Under AEDPA, the applicable statutory triggering event is defined as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" 28 U.S.C.A. §2244 (d)(1)(A). This Court has stated:

> But it is the plain language of §

> 2244(d)(1) that pinpoints the uniform date of finality set by Congress. And that language points to the conclusion of direct appellate proceedings in state court. The statute thus carries out " AEDPA's goal of promoting 'comity, finality, and federalism' by giving state courts 'the first opportunity to review [the] claim,' and to 'correct' any 'constitutional violation in the first instance.' " *Carey v. Saffold*, 536 U.S. 214, 220, 122 S.Ct. 2134, 153 L.Ed.2d 260 (2002) (quoting *Williams v. Taylor*, 529 U.S. 420, 436, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000); *O'Sullivan v. Boerckel*, 526 U.S. 838, 844-845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999); citation omitted). The statute requires a federal court, presented with an individual's first petition for habeas relief, to make use of the date on which the entirety of the state direct appellate review process was completed.

Jimenez v. Quarterman, __ U.S. __, 129 S.Ct. 681, 686 (2009). Consequently, petitioner's requested reinterpretation of the statute is not supported by this Court's precedent. Thus, petitioner would not be entitled to the grant of a Writ of Certiorari, because the Court of Appeals for the Third Circuit's

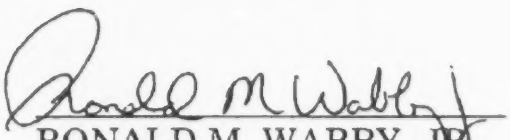
resolution was not in conflict with the decisions of this Court.

CONCLUSION

For the foregoing reasons, the Commonwealth of Pennsylvania respectfully requests this Court to deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

STEPHEN A. ZAPPALA, JR.
DISTRICT ATTORNEY



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PROOF OF SERVICE

I hereby certify that I am this day serving three (3) copies of the within Respondents Brief In Opposition On Petition For Writ Of Certiorari To The United States Court of Appeals for the Third Circuit in the manner indicated below which service satisfies the requirements of Supreme Court of United States Rule 29:

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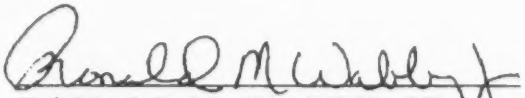

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